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In the Supreme Court of the United States

OCTOBER TERM, 1991

TRIANGLE INDUSTRIES, INC.
A/K/A ANC HOLDINGS, INC.,
TRIANGLE PWC, INC.,

Petitioners,

v.

LIBERTY MUTUAL INSURANCE CO.,
NEW JERSEY PROPERTY/LIABILITY INSURANCE
GUARANTY ASSOCIATION, ON BEHALF OF
IDEAL MUTUAL INSURANCE COMPANY,
IN LIQUIDATION,

Respondents.

BRIEF IN OPPOSITION TO SUPPLEMENTAL BRIEF AND APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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INTRODUCTION

Respondent, Liberty Mutual Insurance Company (hereinafter "Liberty Mutual" or "Respondent"), responds to the *Supplemental Brief and Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit* ("Supplemental Brief") filed by Petitioners, Triangle Industries, Inc. and Triangle PWC, Inc. (collectively referred to hereinafter as "Triangle" or "Petitioners"). In its Supplemental Brief, Triangle argues that, under the doctrine of collateral estoppel, a recent decision of the Supreme Court of Appeals of West Virginia in *Joy Technologies, Inc.* v. *Liberty Mutual Insurance Company*, Docket No. 88-C-96-F (June 11, 1992), in which the law of West Virginia was applied, should be preclusive in this case because Liberty Mutual was a party in both matters. Triangle would have this Court grant *certiorari* and reverse the Circuit Court's decision in this case, which applied the "pollution exclusion" under New Jersey law, because the *Joy Technologies* decision, by a West Virginia court applying West Virginia law, came to a different conclusion. This argument misconstrues both the law of collateral estoppel and the nature of the decision and the proceedings in the West Virginia case. The fact that New Jersey law differs from West Virginia law does not permit Triangle to choose the one it prefers and then argue that Liberty Mutual is "estopped" from obtaining a favorable result under the other.

The *Joy Technologies* court did not interpret the pollution exclusion. *Joy Technologies* holds that, under the specific circumstances present in that case, the public policy of West Virginia requires the application of West Virginia law to the construction of the pollution exclusion. Triangle's contention that the West Virginia court's interpretation of the policy provision under West Virginia law should apply *here*, however, ignores the fact that the Supreme Court of Appeals of West Virginia, which rendered the decision in *Joy Technologies*, is the *same court* which, in the instant case, held that the law of New Jersey, and not the law of West Virginia, must be applied to Triangle's claim. *See Liberty Mut. Ins. Co.* v. *Triangle*

Indus., Inc., 390 S.E.2d 562 (W. Va. 1990). Had the West Virginia court intended that Triangle's declaratory judgment action be controlled by the West Virginia law it set forth in *Joy Technologies*, it would have so ordered when the case was before it. As the West Virginia court did not issue such an order, that Court's decision in *Joy Technologies* does not collaterally estop Liberty Mutual from litigating the policy language at issue in *this case* nor *in any other case* in which Liberty Mutual is a party.

Moreover, Liberty Mutual is not now estopped from litigating the disputed policy language in this case because of certain statements allegedly made by insurance industry representatives to the Commissioner of Insurance of the State of West Virginia. First, the issues considered by the Insurance Commissioner are not the same issues before the Court today. The 1970 submissions concerned the limited question of whether proposed policy language was compatible with the public interest of West Virginia. The Insurance Commissioner did not make any determination of the scope of coverage provided by the pollution exclusion. As the present case centers on the application, under New Jersey law, of the exclusion to *particular* facts of the contamination at the Buckeye Landfill, the *general* proceeding before the Insurance Commissioner could not be decisive on this specific matter. Equally important, the doctrine of collateral estoppel only applies to administrative proceedings which are judicial or quasi-judicial in nature. The 1970 hearing before the West Virginia Insurance Commissioner had none of the fundamental indicia required of a judicial proceeding under case law. Thus, contrary again to Triangle's assertions, Liberty Mutual should not now be precluded from litigating the issue of policy interpretation in this case or any future case because of statements made by insurance industry representatives to the Commissioner of Insurance of the State of West Virginia.[1]

[1] For the reasons outlined in its *Opposition to Petition For a Writ of Certiorari*, Liberty Mutual believes that this case is not properly before this Court. Additionally, although the present case was decided well before *Joy Technologies*, Triangle neither argued nor properly preserved argument of the estoppel issue in the court below. This is not the forum in which to raise new arguments for the first time.

ARGUMENT

POINT 1

THE DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA IN *JOY TECHNOLOGIES, INC.* v. *LIBERTY MUTUAL INSURANCE COMPANY* CANNOT BE A BASIS FOR COLLATERAL ESTOPPEL IN THE PRESENT CASE.

In *Joy Technologies*, the Supreme Court of Appeals of West Virginia reversed the finding of the Circuit Court of Mercer County, West Virginia, which had granted partial summary judgment to Liberty Mutual after determining that the pollution exclusion contained in Liberty Mutual's policies after 1971 barred coverage for the environmental contamination which occurred at a site owned by Joy Technologies, Inc. ("Joy"). *See Joy Technologies, Inc.* v. *Liberty Mutual Insurance Company*, Civil Action No. 88-C-96-F (June 26, 1990). Basing its opinion on *Liberty Mut. Ins. Co.* v. *Triangle Indus., Inc.*, 390 S.E.2d 562 (W. Va. 1990), the Circuit Court held that Pennsylvania law governed construction of the "pollution exclusion." The Circuit Court further granted Liberty Mutual's motion for summary judgment and held that there was no coverage for the underlying claims which arose out of extensive PCB contamination found at Joy's site. On appeal, the Supreme Court of appeals of West Virginia determined that, based on public policy considerations, West Virginia law should govern.

In rejecting application of the law of Pennsylvania, which Joy had argued for and which the Circuit Court had applied, the Supreme Court of Appeals of West Virginia acknowledged that a contrary result would have been reached under Pennsylvania law. *Joy Technologies, supra*, Docket No. 88-C-96-F, slip op. at 7, 10. Indeed, a contrary result would have been reached under the law of many other states as the interpretation

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Should the Court exercise jurisdiction over this matter, however, this brief argues that the doctrine of collateral estoppel does not apply to this case, notwithstanding Triangle's failure to properly argue or preserve this issue.

The Circuit Court further granted Liberty Mutual's motion for summary judgment and held that there was no coverage for the underlying claims which arose out of extensive PCB contamination found at Joy's site. On appeal, the Supreme Court of appeals of West Virginia determined that, based on public policy considerations, West Virginia law should govern.

In rejecting application of the law of Pennsylvania, which Joy had argued for and which the Circuit Court had applied, the Supreme Court of Appeals of West Virginia acknowledged that a contrary result would have been reached under Pennsylvania law. *Joy Technologies, supra*, Docket No. 88-C-96-F, slip op. at 7, 10. Indeed, a contrary result would have been reached under the law of many other states as the interpretation of the pollution exclusion, which Liberty Mutual argued for in *Joy Technologies*, has been adopted by numerous state and federal courts.[2]

Liberty Mutual was a party in many of these cases. Yet, because one court in one state reached a result adverse to Liberty Mutual, Triangle would have Liberty Mutual be forever precluded from litigating the issue in any forum. Such an application of collateral estoppel, as is urged on this Court by Triangle, would mean that an insurance company, *or any other party which is sued in multiple fora*, need lose only one case to be "estopped" from litigating the issue in any other state court (or indeed in any other court), regardless of how many favorable decisions it had obtained. This result is clearly at odds with the law of collateral estoppel and would result in great unfairness. Thus, the decision in *Joy Technologies* should not lead this Court to grant *certiorari* here.

[2] *See, e.g., American States Ins. Co.* v. *Maryland Casualty Co.*, 587 F.Supp. 1549 (E.D. Mich. 1984); *Techalloy Co.* v. *Reliance Ins. Co.*, 338 Pa. Super. 1, 487 A.2d 820 (Pa. 1984); *Barmet of Indiana, Inc.* v. *Security Ins. Group*, 425 N.E.2d 201 (Ind. App. 1981); *Milwaukee* v. *Allied Smelting Corp.*, 117 Wis. 2d 377, 344 N.W.2d 523 (Ct. App. 1983); *Pepper's Steel & Alloys, Inc.* v. *United States Fidelity & Guar. Co.*, 668 F.Supp. 1541 (S.D. Fla. 1987); *American Motorists Ins. Co.* v. *General Host Corp.*, 667 F.Supp. 1423 (D.Kan. 1987); *International Minerals & Chem. Corp.* v. *Liberty Mut. Ins. Co.*, 168 Ill.App.3d 361, 522 N.E.2d 758, *appeal denied*, 122 Ill.2d 576, 530 N.E.2d 246 (1988); *Borden, Inc.* v. *Affiliated FM Ins. Co.*, 682 F.Supp. 927 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir.), *cert. denied*, 493 U.S. 817 (1989).

POINT 2

THE DOCTRINE OF COLLATERAL ESTOPPEL, AS ANNOUNCED IN *PARKLANE HOSIERY CO.* v. *SHORE*, IS INAPPLICABLE TO THE PRESENT CASE.

Triangle also argues in Point 1 of its Supplemental Brief that, in light of *Joy Technologies*, Liberty Mutual is collaterally estopped from litigating the policy language at issue in *this* case because of this Court's decision in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). (Supplemental Brief, at pp. 2-4) Triangle's reliance upon *Parklane Hosiery* is misplaced.

Parklane Hosiery held that collateral estoppel precludes a defendant from relitigating *facts* which had been resolved adversely to it in a prior proceeding with another party. *Parklane Hosiery, supra*, 439 U.S. at 326, 99 S.Ct. at 648, 58 L.Ed.2d at 559. *Joy Technologies* involved an issue of law, *i.e.*, the construction of an insurance policy provision in light of a choice of law question. As no determinations of *fact* were made in *Joy Technologies*, *Parklane Hosiery* is inapplicable.

Parklane Hosiery also held that the application of collateral estoppel would be inappropriate where the decision that is the basis of the estoppel is *inconsistent* with one or more previous decisions in favor of the defendant. *Parklane Hosiery, supra*, 439 U.S. at 322, 330, 99 S.Ct. at 651, 58 L.Ed.2d at 552. *See also General Dynamics Corp.* v. *American Tel. & Tel. Co.*, 650 F.Supp. 1274, 1285 (N.D. Ill. 1986), *cert. granted, amended*, 658 F.Supp. 417 (N.D. Ill. 1987). This is the very situation which is present in the case before the Court. The conclusion of the West Virginia court concerning the pollution exclusion is inconsistent with the prior decisions of numerous other state and federal courts on the same legal issue.[3] While

[3] *See, e.g., Fireman's Fund Ins. Cos.* v. *Ex-Cell-O Corp.*, 702 F.Supp. 1317 (E.D. Mich. 1988); *International Minerals & Chem. Corp.* v. *Liberty Mut. Ins. Co.*, 168 Ill.App.3d 361, 522 N.E.2d 758 (Ill. Ct. App. 1st Dist. 1988), *appeal denied*, 122 Ill.2d 576, 530 N.E.2d 246 (1988); *Lower Paxton Township* v. *United*

certain courts have, after applying their own law to varying facts, reached results adverse to Liberty Mutual, Triangle's assertion that Liberty Mutual "should now be bound by those [adverse] adjudications" (Supplemental Brief, at p. 9), is as disingenuous as it is wrong. To estop Liberty Mutual from litigating the pollution exclusion after it loses one case, despite winning numerous other cases, misapplies the doctrine of collateral estoppel. Collateral estoppel should not apply each and every time that there is a difference of opinion among courts of different jurisdictions with respect to the construction of a term in an insurance policy. It is entirely possible — indeed common — for different courts in different states to apply *their own bodies of law* and *have different opinions* as to the meaning of identical contractual or statutory language.[4] In such cases, as is necessary to invoke the doctrine of collateral estoppel, the issues cannot be "identical" if the governing law is not the same. Accordingly, even if the *Joy Technologies* court *had* decided the meaning of the pollution exclusion under West Virginia law, Liberty Mutual should not now be estopped from arguing (and a court from deciding) that it means something else under New Jersey law.

States Fidelity & Guar. Co., 383 Pa. Super. 558, 557 A.2d 393 (Pa. Sup. 1989), *appeal denied*, 562 A.2d 653 (Pa. 1989); *Lumbermens Mut. Casualty Co.* v. *Belleville Indus., Inc.*, 555 N.E.2d 568, 407 Mass. 675 (Mass. 1990); *Technicon Elec. Corp.* v. *American Home Assurance Co.*, 141 A.D.2d 124, 533 N.Y.S.2d (N.Y. App.Div. 1988), *aff'd*, 74 N.Y.2d 66, 544 N.Y.S.2d 531, 542 N.E.2d 1048 (1989); *The Upjohn Co.* v. *New Hampshire Ins. Co.*, 438 Mich. 197 (1991).

[4] For example, in *Just* v. *Land Reclamation, Ltd.*, 155 Wis.2d 737, 456 N.W.2d 570 (Wis. 1990), the Supreme Court of Wisconsin concluded that, in the context of an environmental insurance case, the word "sudden" in the pollution exclusion was "reasonably susceptible to different meanings" and was, therefore, *ambiguous*. *Id.* at 571. Confronted with another environmental insurance case, the Massachusetts Supreme Judicial Court held in *Lumbermens Mut. Casualty Co.* v. *Belleville Indus., Inc.*, 407 Mass. 675, 555 N.E.2d 568 (Mass. 1990), that the language in the pollution exclusion was *unambiguous*.

POINT 3

THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT APPLY TO THE 1970 SUBMISSIONS MADE TO THE COMMISSIONER OF INSURANCE OF THE STATE OF WEST VIRGINIA.

Triangle argues in Point 2 of its Supplemental Brief that Liberty Mutual is collaterally estopped from advocating a position regarding the interpretation of the "sudden and accidental" exception to the pollution exclusion because of certain statements allegedly made by certain insurance industry representatives to the West Virginia Insurance Commissioner ("Insurance Commissioner") in 1970 (the "1970 submissions"). (Supplemental Brief, at pp. 5-10) This estoppel argument is, presumably, derived from *Joy Technologies*, in which the Supreme Court of Appeals of West Virginia held that, because of the 1970 submissions, the law of West Virginia, rather than the law of Pennsylvania, should apply to the pollution exclusion.

In considering whether collateral estoppel should be applied in a given case, however, a court must first determine whether a given issue has been *actually litigated* by the parties in the earlier suit. *Parklane Hosiery*, *supra*, 439 U.S. at 326-31, 99 S.Ct. at 649-52, 58 L.Ed.2d at 559-62; *General Dynamics*, *supra*, 650 F.Supp. at 1281. The issues considered by the Insurance Commissioner are not the same issues before the Court today. The 1970 submissions concerned the limited question of whether proposed policy language regarding the pollution exclusion was compatible with the public interest of West Virginia. In contrast, however, the present case centers on the application, *i.e.*, *the scope*, of the language of the exclusion to the *particular* facts of the contamination at the Buckeye Landfill. Accordingly, the *general* proceeding before the Insurance Commissioner could not be decisive on this specific matter.

Collateral estoppel should not be applied to quasi-judicial determinations of administrative agencies such as the 1970

proceeding before the Insurance Commissioner. While this Court in *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 421-22, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966), recognized that the doctrine of collateral estoppel may be applied to quasi-judicial determinations of administrative agencies, subsequent interpretations of *Utah Construction* have held the doctrine of collateral estoppel should not be indiscriminately applied to all determinations by administrative agencies. Rather, agency findings may be given preclusive effect only where the agency acts in a *judicial capacity* and the party against whom estoppel will be applied had a full and fair opportunity to present its case to the agency.[5] *General Dynamics, supra*, 650 F.Supp. at 1285 n.10.

The 1970 proceeding before the Insurance Commissioner did not involve any of the essential characteristics of a judicial type hearing. *See Mellon-Stuart Co.* v. *Hall*, 359 S.E.2d 124, 133 (W.Va. 1987). There were no requirements that the participants testify under oath or that formal rules of pleading and evidence be observed. W. Va. Ins. Code, § 33-2-13. There was no requirement that the Insurance Commissioner make a detailed record of the proceedings. Indeed, none of the fundamental indicia, necessary *to confer "judicial character" upon an administrative proceeding*, was followed in the hearing before the West Virginia Insurance Commissioner. Thus, as there is no basis for finding that the Insurance Commissioner had judicial powers, collateral estoppel cannot be applied to the outcome of the 1970 proceedings.

Further, collateral estoppel is a highly technical doctrine that applies only in severely limited circumstances. It is designed to prevent a party from relitigating ultimate issues of *fact* that already have been resolved against that party. *See Teledyne Indus., Inc.* v. *N.L.R.B.*, 911 F.2d 1214, 1220 (6th Cir. 1990); *Edwards* v. *Aetna Life Ins. Co.*, 690 F.2d 595, 598

[5] *See also Mellon-Stuart Co.* v. *Hall*, 359 S.E.2d 124, 133 (W.Va. 1987); *Pacific Elec. Contractors Ass'n.* v. *A.A. Electric*, 583 F.Supp. 472, 477 (D.Haw. 1984); *Restatement (Second) of Judgments* § 83 (1982); K. Davis *Administrative Law* § 21:1 (2d ed. 1983); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4475 (1981); 2 Am. Jur. 2d *Administrative Law* § 496 (1962).

(6th Cir. 1982). The doctrine of collateral estoppel is not meant to apply to matters of law.[6] *McNunis* v. *Zukosky*, 141 W.Va. 145, 89 S.E.2d 354, 358 (W.Va. App. Ct. 1955). As the 1970 submissions to the Insurance Commissioner consisted solely of the *opinions* of various insurance industry spokespeople on the scope of coverage, and did not constitute points of law, the doctrine of collateral estoppel is inapplicable to 1970 submissions quoted by Triangle.

Moreover, the statements which Triangle cites are, in essence, mischaracterizations of, and selective quotations from, the 1970 submissions. (Supplemental Brief, pp. 5-10). For example, Triangle quotes in its Supplemental Brief an excerpt taken from a portion of a May 11, 1970 submission by the Mutual Insurance Rating Bureau ("MIRB"), a trade group to which Liberty Mutual belonged. (Supplemental Brief, at p. 6) Despite the fact that the excerpt quoted by Triangle clearly states that the purpose of the pollution exclusion was to "*avoid* any question of intent," Triangle implies that the exclusion bars coverage only when the pollution harm is *intended* by the insured. (Supplemental Brief, at p. 6) This argument flies in the face of both logic and *the language of the submission itself*. Statements taken out of context and misapplied should not serve as the basis for collateral estoppel.

Finally, the doctrine of collateral estoppel also requires that the party against whom it is invoked have taken successive, *inconsistent* positions in *successive suits*. The position Liberty Mutual has taken in this case is *consistent* with the position taken by various insurance industry representatives in 1970. For example, both Liberty Mutual and the MIRB believed that

[6] As other courts have explained: "Usually the rule is applicable only to bar the assumption of inconsistent positions as to factual matters and is not to be applied where a party assumes inconsistent positions as to contentions of law as applied to a given state of facts. Consequently a change of position with respect to a pure matter of law ordinarily will not work an estoppel. . . ." *Kansas City* v. *Martin*, 391 S.W.2d 608, 616 (Mo. Ct. App. 1965). *See also U.S.* v. *Irvin*, 787 F.2d 1506 (11th Cir. (Ga.) 1986); *Frye* v. *United Steelworkers of America*, 767 F.2d 1216 (7th Cir. (Ind.) 1985); 31 C.J.S. *Estoppel* § 117, at 613 (1964); *Pittston Co.* v. *O'Hara*, 191 Va. 886, 63 S.E.2d 34, *appeal dismissed sub nom.*, *Winn* v. *Pittston Co.*, 342 U.S. 803 (1951); *Grodsky* v. *Sipe*, 30 F.Supp. 656, 660 (Ill. 1940) (one "cannot be estopped as to admissions as to the law").

pollution which resulted from ongoing releases, rather than a sudden event, was excluded under the "occurrence" definition. Thus, Liberty Mutual's position has been *consistent* with that taken by the various insurance industry representatives in 1970 and Triangle should not be allowed to collaterally estop Liberty Mutual through the selected use and misrepresentation of insurance industry submissions.

CONCLUSION.

Triangle seeks to collaterally estop Liberty Mutual collaterally from litigating the policy language at issue in this case because of the *Joy Technologies* decision. However, based on the foregoing discussion, the offensive use of the collateral estoppel doctrine by Triangle would be inappropriate and would result in substantial injustice to Liberty Mutual. Liberty Mutual, therefore, respectfully moves this Court to deny the *Petition for Writ of Certiorari to the United States Supreme Court* filed by Triangle in this action.

Respectfully submitted,

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